

Guidance on Retroactive Pay, Leave, and Benefits

NOTE: In order to issue retroactive payments as quickly as possible, payroll providers may make some simplifying assumptions. Thus, the initial retroactive pay may not fully reflect application of all the guidance in this document regarding the treatment of hours for pay, leave, and other purposes. For example, the initial retroactive pay may not include pay for irregular overtime work performed by excepted employees during the lapse in appropriations. Payroll providers will work with agencies to make any necessary adjustments as soon as practicable. Agencies should follow the guidance of their respective payroll providers for the recording of time and attendance. For example, employees may be coded as if in work status during furlough periods to ensure that all employees are paid at their “standard rate of pay.”

Pay

- Under 31 U.S.C. 1341(c), Federal employees affected by the lapse in appropriations that began on December 22, 2018, and ended on January 25, 2019, must receive retroactive pay at the employee’s “standard rate of pay” for the lapse period as soon as possible after the lapse ends.
- An *excepted* employee who performed work during the lapse in appropriations may be paid for that work. The “standard rate of pay” for excepted hours of work is the pay the employee is entitled to for actual hours of work under the normally applicable pay rules. For example, if an excepted employee performed additional overtime work beyond the normal requirements for his or her job, he/she would be paid for that actual overtime work. All excepted hours of work are time in a pay status for pay, leave, and benefit purposes.
- For periods of time during which an employee was *furloughed* during the lapse in appropriations, the “standard rate of pay” is the pay the employee would have received for the furlough hours had the lapse in appropriations not occurred and the employee had performed work.

Therefore—

- An employee is entitled to receive his or her rate of basic pay for the furlough time to the extent that he or she would have been in a basic pay status but for the lapse of appropriations.

- An employee receives retroactive pay for furlough time without being charged paid leave, since a lapse in appropriations generally prevents the use of paid leave.

- All furlough hours for which retroactive pay is received are treated as time in a pay status for pay, leave, and benefit purposes. For example, for the purpose of applying General Schedule waiting periods associated with within-grade increases, the furlough time during the lapse in appropriations is treated as time in pay status.

- A furloughed employee who, during the lapse in appropriations, had been regularly scheduled to perform overtime work or to perform work at night or during a period for which any other form of premium pay would otherwise be payable is entitled to receive overtime pay, night pay, or other premium pay as if the work had been performed.

- Allowances, differentials, and other payments otherwise payable on a regular basis (e.g., administratively uncontrollable overtime pay and law enforcement availability pay) must be paid as if the furloughed employee actually continued to work.

- All periods of time during which a furloughed employee would, but for the lapse in appropriations, have been in a pay status (including regularly scheduled overtime hours and standby duty) must be considered "hours of work" for pay administration purposes under the Fair Labor Standards Act.

- A furloughed employee is not entitled to retroactive pay for furlough periods if the employee had been previously (before the lapse) scheduled to be in nonpay status during those periods. For example, an employee may have scheduled leave without pay (LWOP) for an extended period or be in a suspension status (i.e., pay suspended based on an adverse action). In effect, those already-in-place periods of nonpay status override the furlough status. The "standard rate of pay" for such previously scheduled periods of nonpay status is zero.

- Agencies have the flexibility to grant limited amounts of excused absence (administrative leave) for nonwork periods after the lapse is over if deemed necessary based on extenuating personal circumstances that delay the employee's return to duty.

Garnishments

Some paychecks are normally susceptible to a garnishment pursuant to a variety of court orders. If a payroll provider is unable to effectuate the garnishment, it should provide a notice to that effect to affected employees and indicate how the provider intends to handle the missed garnishments going forward.

Leave Accrual

- An employee furloughed during the lapse in appropriations must now be considered to have been in a pay status to the extent that he or she would have been in a pay status but for the lapse in appropriations. As a result, agencies must adjust the employee's leave account for proper recredit of any lost accrual of annual or sick leave due to being in a nonpay status. Since the employee is retroactively placed in a pay status, annual and sick leave will accrue in accordance with the normal rules.

- *Excepted* employees earned pay and accrued leave during the periods they performed excepted work activities—even though no payments could be made during the lapse. With the payment of retroactive pay, agencies should ensure that *excepted* employees’ leave accrual is properly credited.

Restoration of “Use or Lose” Annual Leave

As provided in CPM 2019-02 issued on January 9, 2019, the U.S. Office of Personnel Management (OPM) and the Office of Management and Budget determined that a lapse in appropriation qualifies as an exigency of the public business for purposes of annual leave restoration. Therefore, as long as the leave was properly scheduled in advance, agencies must restore any annual leave that was forfeited because of the lapse in appropriations—regardless of whether the affected employees were furloughed or excepted from the furlough.

For employees on the standard biweekly pay period cycle, the annual leave ceiling is applied on January 5, 2019, which was the end of the 2018 leave year. In order for forfeited annual leave to be considered for restoration under 5 U.S.C. 6304(d)(1), it must have been scheduled in writing no later than November 24, 2018, in accordance with 5 CFR 630.308(a). Employing agencies are responsible for determining whether an employee met the advance scheduling requirement, based on OPM regulations and agency policies and procedures. As allowed by those agency policies and procedures, the “in writing” requirement may be met in various ways, including electronic communications such as email, electronic calendar scheduling, or submissions to a time and attendance system.

Any previously restored annual leave that was due to expire at the end of the 2018 leave year under 5 CFR 630.306 or 630.309, and was subsequently forfeited, may not be restored again—even if the forfeiture was due to the lapse in appropriations.

“Use or Lose” Annual Leave Scheduled for December 24, 2018

As noted above, in order for forfeited annual leave to be considered for restoration under 5 U.S.C. 6304(d)(1), it must have been scheduled in writing no later than November 24, 2018, in accordance with 5 CFR 630.308(a).

For an employee who **did not meet** that advance scheduling requirement for leave scheduled on December 24, any annual leave on that day that is forfeited at the end of the leave year may **not** be restored.

For an employee who **did meet** the advance scheduling requirement for leave scheduled on December 24, the establishment of a holiday by the President does **not** constitute an exigency of the public business. Thus, annual leave forfeited because the December 24 holiday prevented its use cannot be restored just because the holiday prevented usage of the leave. (See Comptroller General decision B-182549, August 22, 1975.)

However, if the employee's **rescheduling and use** of the leave (originally scheduled for use on December 24) to another workday before the end of the leave year (i.e., January 5, 2019, for most employees) was prevented by an exigency of the public business, the leave may be restored. For example:

- If an employee **attempted to reschedule** the December 24th hours of annual leave on an available workday(s) **before** the lapse in appropriations commenced on December 22, but the agency did not approve the leave because of an exigency of the public business (e.g., work requirements), any leave forfeited because of that exigency may be restored.
- If, **but for the lapse in appropriations**, an employee **could have rescheduled** the December 24th hours of annual leave on an available workday(s) during the period from December 22, 2018, through January 5, 2019, any of that leave that is forfeited may be restored—as long as the employee attests that he would have scheduled the leave before the end of the leave year but for the lapse. [NOTE: This scenario does not apply if the employee had scheduled annual leave on all workdays for the remainder of the leave year (through January 5, 2019). In that case, if there had not been a lapse, there would have been no possibility of rescheduling the December 24th hours of annual leave to another workday, since there were no available workdays. Since the option of rescheduling was not prevented by the lapse, the forfeited leave may not be restored.]

Preapproved Leave Without Pay (LWOP)

In the case of an employee who was on preapproved LWOP during the lapse in appropriations (that began on December 22, 2018, and ended on January 25, 2019), the employee must continue to be charged LWOP for all periods of such preapproved LWOP that occurred during the lapse.

Family and Medical Leave Act (FMLA)

Under FMLA, an employee is entitled to 12 weeks of unpaid leave during any 12-month period and may elect to substitute certain types of paid leave (i.e., sick leave, annual leave, advanced leave, and annual leave donated under the Voluntary Leave Transfer Program or the Voluntary Leave Bank Program), consistent with current laws and OPM's regulations. During the lapse in appropriations, affected employees who would otherwise be in pay status must be (1) furloughed or (2) at work performing excepted activities—unless they elect to seek approval to use paid leave during the lapse under 31 U.S.C. 1341(c)(3). Agencies were instructed to cancel any previously scheduled paid leave (including paid leave substituted for FMLA LWOP) during the furlough period.

Furloughed Federal employees are entitled to their “standard rate of pay” for the entire period of the lapse in appropriations. For employees who were otherwise scheduled to be in nonpay

status, the standard rate of pay is zero. Accordingly, an employee on FMLA leave during the furlough period, should be treated as follows:

- **FMLA LWOP Throughout the Furlough Period.** An employee scheduled to take FMLA LWOP throughout the furlough period continues to be charged LWOP. The employee is not entitled to receive retroactive pay.
- **Scheduled Use of Both FMLA LWOP and Paid Leave Substituted for FMLA LWOP Intermittently.** For any hours during the lapse in appropriations for which an employee was previously scheduled to be in FMLA LWOP status, the employee will remain in that status. For any hours during the lapse in appropriations for which the employee was scheduled to be in paid leave status by substituting paid leave (excluding donated annual leave) for FMLA LWOP, the employee will be provided retroactive pay and will not be charged paid leave, consistent with the treatment of other employees who had previously scheduled paid leave that was cancelled due to the lapse in appropriations. (See section “Donated Annual Leave” below regarding treatment of employees who had scheduled use of donated annual leave substituted for FMLA LWOP.)
- **12-week FMLA Entitlement.** Since the legislation provided for retroactive application of the employee’s “standard rate of pay,” the employee’s previously invoked FMLA coverage will remain in place during the furlough period, and the FMLA-covered time (paid or unpaid) counts toward the 12-week FMLA entitlement.

Donated Annual Leave

- Under the voluntary leave transfer program (VLTP) and voluntary leave bank program (VLBP), an employee may apply to receive donated annual leave if he or she is experiencing a personal or family medical emergency that would place him or her in a LWOP status for at least a 24-hour period. (See 5 CFR part 630, subparts I and J, for more information.)
- During the lapse in appropriations, no paid leave could be used, and all scheduled paid leave was cancelled; thus, any scheduled use of donated annual leave was also cancelled, and an affected employee was placed in nonpay status (LWOP or furlough period).
- An employee whose donated annual leave was cancelled due to the lapse in appropriations is not entitled to retroactive pay provided under 31 U.S.C. 1341(c) for the affected periods. The retroactive pay provision provides that employees may receive their “standard rate of pay” (without charge to leave) for furlough periods. The pay an employee would have received by using donated annual leave is not considered to be part of an employee’s “standard rate of pay”. For such an employee who would be in a

LWOP status but for the possible use of donated annual leave, the “standard rate of pay” is zero.

- Under a VLTP or VLBP, a leave recipient may retroactively substitute donated annual leave for any period of LWOP that began on or after the date fixed by the agency as the beginning of the medical emergency. (See 5 CFR 630.909(d) and 5 CFR 630.1009(d).) Therefore, a leave recipient may retroactively substitute donated annual leave for any period of LWOP used for the approved medical emergency during the lapse in appropriations.
- Under the FMLA at 5 CFR 630.1206(b), donated annual leave under the VLTP or VLBP may be substituted for FMLA LWOP on a concurrent basis; however, under 5 CFR 630.1206(e), there is a general bar on *retroactive* substitution of paid leave for FMLA LWOP. Despite that general bar, OPM has taken the position that donated leave under the VLTP or VLBP can be retroactively substituted for FMLA LWOP, since the VLTP and VLBP regulations provide specific superseding authority and since OPM regulation expressly allow those types of donated leave to be substituted for any period of LWOP, including FMLA LWOP, that began on or after the date of the medical emergency that was used for the medical emergency. (See 5 CFR 630.909(d).)

Alternative Work Schedules

There are two types of alternative work schedules (AWS)—a flexible work schedule and a compressed work schedule. Normally, once a compressed work schedule is established, the days and hours are fixed and cannot be changed; however, changes in an employee’s flexible work schedule may be made under agency policies and collective bargaining obligations (if applicable). For example, in appropriate circumstances, the AWS day off for an employee with a flexible work schedule may be changed to a different day in the same biweekly pay period.

Since the lapse ended in the middle of the January 20-February 2 biweekly pay period, there may be issues regarding the timing of an employee’s AWS day off that was scheduled to occur during the post-lapse portion of the pay period (January 27-February 2). For example, an employee’s scheduled AWS day off could be on the second Friday of the pay period (i.e., February 1) but the employee may want to move that AWS day off to Monday, January 28, since the employee needs more time to reestablish child daycare arrangements after the lapse ended. If the employee has a flexible work schedule, it may be possible to make the desired change under agency policies and any applicable collective bargaining agreement.

A furloughed employee may not be permitted to move an AWS day off that was scheduled to occur during the pre-lapse portion of the pay period (January 20-January 26). Retroactive pay at the standard rate of pay is based on each employee’s established (standard) schedule. No retroactive pay is provided for an AWS day off. An employee cannot move an AWS day off in order to obtain retroactive pay for a normal day off under the employee’s established schedule.

Compensatory Time Off “in-lieu-of” Overtime Premium Pay

While there is no authority to extend the use of compensatory time off in-lieu-of overtime not used within the 26 pay period limitation, payment for the unused compensatory time off must be made at the overtime rate in effect when earned in the following circumstances:

- For FLSA-exempt (i.e., not covered) employees, under 5 CFR 550.114(d)(2), payment must be made if an exigency of the public beyond the employee’s control prevented the employee from using the compensatory time off within the regulatory time limits. A lapse in appropriations is considered be an exigency of the public business; thus, if an agency determines that the lapse prevented the employee from using the compensatory time off that would otherwise be forfeited, the agency must provide payment for the unused compensatory time off.
- For FLSA-nonexempt (i.e., covered) employees, under 5 CFR 551.531(d), if, for any reason, earned compensatory time off is not taken within 26 pay periods during which it was earned, the employee must be paid for overtime work.

Compensatory Time Off for Travel

If an employee fails to use his or her accrued compensatory time off for travel before the end of the 26th pay period after the pay period during which it was earned due to an exigency of the service beyond the employee's control under 5 CFR 550.1407(e), the head of an agency, at his or her sole and exclusive discretion, may extend the time limit for using compensatory time off for travel for up to an additional 26 pay periods.

OPM considers a shutdown furlough to be an exigency of the service beyond the employee’s control.

Military Leave

- *Pre-approved Military Leave.* An employee who had previously scheduled military leave under any of the provisions under 5 U.S.C. 6323 for absences from December 22, 2018, until the end of the lapse in appropriations, would have been in a pay status but for the lapse in appropriations. Accordingly, an employee is entitled to receive retroactive pay at the employee’s “standard rate of pay”. This may include the day before or after the holidays occurring during the lapse.
- *Retroactive Substitution of Military Leave.* Employees may not retroactively substitute military leave for LWOP during the furlough period since furloughed employees generally may not be charged any other form of paid leave (i.e., annual leave, sick leave, or other paid leave), compensatory time off in lieu of overtime, compensatory time off for travel, religious compensatory time off, or credit hours under a flexible work schedule during the furlough period. This would mean unless they were previously

scheduled to use military leave on a day before or after a holiday, employees cannot retroactively substitute military leave for LWOP in order to receive pay for a holiday.

- *Recredit of Canceled Military Leave.* As a result of the cancellation of scheduled military leave during the lapse in appropriations, agencies must recredit an employee's military leave account. This recredited military leave may be used after the end of the lapse in appropriations.
- *Furlough Notices.* Employees who were on Absent-Uniformed Services for an extended period of LWOP may not have been given a furlough notice. The guidance applies whether or not an employee was given a furlough notice.

Holidays

- Except as provided below, an employee affected by the lapse in appropriations will receive his or her regular holiday pay for the Christmas Eve, Christmas Day, New Year's Day, and Martin Luther King, Jr holidays (or "in lieu of" holidays, if applicable) and, if applicable, holiday premium pay for work performed by an employee during his or her normal hours of duty on the holiday, plus overtime pay for work in excess of the normal hours of duty on the holiday. Also, if an employee was regularly scheduled to work on these holidays and was instead furloughed, the employee is now entitled to holiday premium pay, as discussed in the "Pay" section above.
- An employee who was on preapproved LWOP from December 22, 2018, until the end in the lapse of appropriations, must continue to be charged LWOP for the duration of the period approved as LWOP. If such an employee was on LWOP on both the last workday before a holiday and the first workday after the holiday, he or she will not be paid for the holiday. This is consistent with our longstanding guidance and a Comptroller General decision (56 Comp. Gen. 393 (1977)).

Retirement Deductions and Actions

- Retirement deductions under the Civil Service Retirement System or the Federal Employees Retirement System must be deducted from the employee's retroactive basic pay for the period from December 22, 2018, until the end of the lapse in appropriations. The employing agency must also contribute to the Retirement Fund its corresponding share for the retroactive payment. The total retirement deductions and agency contributions for each employee should equal the amount that would have been withheld and contributed had the employee not been affected by the lapse in appropriations. These amounts should be remitted to OPM using the normal procedures for retroactive adjustments.
- The period of retroactive pay is fully creditable for retirement purposes and is not considered LWOP.

- Agencies should process retirement actions effective during the period from December 22, 2018, until the end of the lapse in appropriations, as follows:

- For employees who, on or before the requested retirement date, submitted some notice of their desire to retire, agencies should make the retirement effective as of the date requested. The retirement request may be informal (such as a letter requesting retirement and can be either mailed or personally submitted to the agency (even if put under the door)). Any additional required paperwork, such as the formal retirement application form, may be completed after the date of enactment. No time periods after the effective date of the retirement may be considered as duty time, since the individual would no longer be an employee of the agency.

- Some employees may request retirement retroactive to a date prior to submission of the request. The Comptroller General has issued guidance permitting retroactive personnel actions (including retirements) only under limited enumerated circumstances—i.e., “where administrative or clerical error (1) prevented a personnel action from being effected as originally intended, (2) resulted in nondiscretionary administrative regulations or policies not being carried out, or (3) has deprived the employee of a right granted by statute or regulation.” (See 58 Comp. Gen. 51, at 53 (1978).) It will be up to the employing agency to determine in each case whether the Comptroller General’s criteria have been met.

- If any retirement application has been delayed because of the lapse in appropriations, it should be quickly processed and submitted to OPM so that OPM will be able to begin annuity payments as soon as possible.

Voluntary Separations – Employee Requests to Change Effective Date

The effective date of a voluntary separation (e.g., retirement, resignation) is determined by the employee. An agency may permit an employee to withdraw his/her voluntary separation at any time before it has become effective, but the agency is not obligated to accept changes after the effective date has passed (see 5 CFR 715.202 and the *CSRS and FERS Handbook* part 41A3).

Thrift Savings Plan (TSP)

Agencies and employees should refer to guidance on the TSP website (www.tsp.gov) or contact their agency representative for information. Agency representatives may contact the Federal Retirement Thrift Investment Board at (202) 942-1450 for additional information.

Federal Employees Health Benefits (FEHB) Program

- Some employees may be eligible to enroll or change enrollment because of a qualifying life event that occurred during the period from December 22, 2018, until the end of the lapse in appropriations. In cases where the effective date would normally be the first day of the first pay period following the day the employing office receives the

enrollment request and that follows a pay period during any part of which the employee is in pay status, agencies may assign the effective date as if the employee had submitted the enrollment request immediately following the event.

- If the 60-day period for an employee to submit an enrollment or change in enrollment ended during the period from December 22, 2018, until the end of the lapse in appropriations, agencies may use their belated enrollment authority to extend the period for the employee to submit the request for enrollment or change in enrollment.
- Deductions and contributions for FEHB for each enrolled employee should equal the amount that would have been deducted and contributed had the employee not been affected by the lapse in appropriations. These amounts should be remitted to OPM using the normal procedures for any retroactive adjustments as necessary.

Federal Employees Dental and Vision Insurance Program (FEDVIP), Federal Long Term Care Insurance Program (FLTCIP), and Federal Flexible Spending Account (FSAFEDS) Program

- Agencies should process deductions for FEDVIP and FLTCIP and allotments for FSAFEDS in accordance with the billing file and instructions received from BENEFEDS and Long Term Care Partners.
- In general, there should have been no direct bills mailed to employees for missed FEDVIP or FLTCIP deductions due to the lapse in appropriations.
- In general, FEDVIP, FLTCIP, and FSAFEDS deductions are not taken from retroactive pay but instead are deducted in adjusted amounts in future pay periods. There may be exceptions.
- BENEFEDS and Long Term Care Partners will calculate the amount of any needed adjustments and include those in future billing files.
- Amounts deducted should be remitted to BENEFEDS and Long Term Care Partners using normal procedures.
- Employees who have questions may obtain more information at:

- www.BENEFEDS.com (for FEDVIP deductions and FSAFEDS allotments)

- www.LTCFEDS.com (for FLTCIP)

- www.FSAFEDS.com (for FSAFEDS claims)

Federal Employees' Group Life Insurance (FGLI) Program

Because retroactive pay will generally be provided for the period from December 22, 2018, until the end in the lapse of appropriations, life insurance deductions and contributions for each enrolled employee should equal the amount that would have been deducted and contributed had the employee not been affected by the lapse in appropriations. These amounts should be remitted to OPM using the normal procedures for any retroactive adjustments as necessary.

Unemployment Compensation for Federal Employees (UCFE)

- The UCFE Instructions to Federal Agencies advise that whenever a retroactive payment is made, the Federal agency must check the agency file of Forms ES-931 received to determine if the recipient of the retroactive payment filed a claim for unemployment benefits within the last 52 weeks and, if so, the agency should inform the state unemployment insurance (UI) agency of the amount and period covered by the retroactive payment.
- The state UI agency will determine whether or not an overpayment exists and, generally, the recovery of the UCFE overpayment is a matter for state action under its law; however, some state UI laws require the employer to recover such overpayment by collecting the overpayment amount from the employee. The Federal and state agencies will need to coordinate to determine the required action in accordance with the individual state UI law. Federal agencies are encouraged to develop lists or spreadsheets that can be provided to the state(s) containing the employees' names, social security numbers, and the amounts and periods of time covered by the retroactive payment.

Documentation of Personnel Actions

- Prior to the lapse in appropriations, agencies were instructed not to prepare SF-50 documentation of the furlough and advised that further instructions on the appropriateness of preparing an SF-50 would be provided once appropriations had been signed. Accordingly, agencies do not have to process an SF-50 to document the shutdown furlough that began on or about December 22, 2018, nor should the furlough be recorded with any document designated for long-term filing in the Official Personnel Folder. If SF-50s were processed in error documenting the furlough, such SF-50s must be cancelled citing 001/Cancellation with legal authority ATM/5 U.S.C. 302.

Employees should contact their human resources office for additional information.